TENAGA NASIONAL BHD

v.

PRORAK SDN BHD & ANOR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
NH CHAN JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: W-02-525-1998]
25 OCTOBER 1999

CIVIL PROCEDURE: *Absence of defendant and/or counsel - Continued hearing - Whether judge could proceed with hearing - Options available to judge - Rules of the High Court 1980, O. 35 r. 1(2)*

CIVIL PROCEDURE: *Absence of defendant and/or counsel - Dismissal of summons to set aside judgment in default - Whether final order - Whether could be reinstated - Whether appeal required*

CIVIL PROCEDURE: *Default judgment - Setting aside - Whether oral application made before order extracted sufficient - Whether court functus officio - Whether formal application required - Whether judge should exercise inherent discretion under Rules of the High Court 1980, O. 92 r. 4*

CIVIL PROCEDURE: *Functus officio - When is court functus officio - Whether order which had been entered but not perfected by court can be set aside by same court on an oral application - Whether formal application required - Whether court functus officio*

CIVIL PROCEDURE: *Res judicata - Judgment - Application to set aside judgment - First application dismissed - Second application based on different ground - Whether res judicata*

The appellant, a publicly-owned electricity company, was sued by the respondents for breach of contract. At the commencement of trial in the High Court, the respondents' counsel informed the court that the trial was to be confined to the sole issue of liability, following which if the appellant was found liable, an assessment of damages would be made.

Due to lack of time, the trial was adjourned. At the continuation of trial, the appellant's counsel was absent. New hearing dates were set but counsel for the appellant was again absent. Judgment was entered against the appellant and its counterclaim was dismissed. Later that morning, the appellant's counsel made an oral application to set aside the judgment ('the oral application').

However, the respondents' counsel argued that the court was *functus officio*, and the appellant's counsel agreed, informing the court that he would make a formal application. The appellant then took out a summons to set aside the default judgment ('the first application').

At the hearing of the first application, both counsel were absent, and the court dismissed the summons. The appellant then took out another summons to restore the first application ('the summons to reinstate') but this was also dismissed.

The appellant subsequently appealed to the Court of Appeal against the dismissal of the summons to reinstate. However, the appeal was also dismissed. The appellant then took out another summons to set aside the default judgment, this time relying on a different ground, ie. that of nullity ('the second application'). The second application was dismissed on the ground that the court was *functus officio*. The appellant appealed again.

Held:

Per Gopal Sri Ram JCA

[1] The court was not *functus officio* merely because judgment had been entered. The default orders had not been extracted and thus when the oral application was made, the court continued to have full control over the judgment it had entered.

[2] The default judgment was defective and therefore irregular as it breached the express understanding between counsel, which had been sanctioned by the court, that only the issue of liability was to be tried. Therefore, the limitations on the court's power to recall a judgment which had not yet been perfected did not apply.

[3] The judgment being irregular, was liable to be set aside *ex debito justitiae*. Furthermore, a written application was unnecessary in this particular case as the oral application to set aside was made later that same morning, with no objection from the respondents. The judge could therefore have acted under O. 92 r. 4 of the Rules of the High Court 1980 ('the RHC').

[4] In view of the agreement between counsel, the judge should have properly exercised his discretion under O. 35 r. 1(2) of the RHC to proceed with the trial in default of appearance of one of the parties. Alternatively, he could have entered interlocutory judgment on liability and proceeded to assess damages.

[5] The first application had been dismissed and not struck out. It was a final order which could not be reinstated and the appellant ought to have brought an appeal. The subsequent order dismissing the summons to reinstate was also a final order.

[6] The inherent jurisdiction of the court to set aside final orders must be exercised with much care. It applies only to orders which contravene a substantive law and does not extend to a final order which is procedurally defective and hence merely irregular, as in the present case. The judgment therefore did not fall to be set aside under the court's inherent jurisdiction.

[7] The doctrine of *res judicata* in its wider sense did not permit the appellant to make a second application to set aside the judgment on a different ground, as the issue properly belonged to the first application. The judge was thus correct in dismissing the second application.

[Appeal dismissed with costs.]

Case(s) referred to:

Adzmi Ali & Anor v. Mohamed Isa Kasad [1987] 1 CLJ 445 ***(refd)***
Badiaddin Mohd Mahidin & Anor v. Arab-Malaysian Finance Bhd [1998] 2 CLJ 75 ***(foll)***
Chee Kuan Cheng v. Chuo Kong Kah [1967] 2 MLJ 74 ***(foll)***
Chua Wah Keow v. Ng Ho Huat & Anor [1961] MLJ 321 ***(refd)***
Chua Weng Meng v. Wong Kok Kong [1999] 6 CLJ 7 ***(foll)***
Doyle v. Olby Ltd [1969] 2 All ER 119 ***(foll)***
Government of Malaysia v. Dato' Chong Kok Lim [1973] 2 MLJ 74 ***(foll)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 ***(refd)***
Henderson v. Henderson [1843] 67 ER 313 ***(foll)***
Isaacs v. Robertson [1985] AC 97 ***(foll)***
Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor [1999] 1 CLJ 1 ***(refd)***
Lee Hock Ning v. Government of Malaysia [1972] 2 MLJ 12 ***(refd)***
Mitsubishi France v. Neyveli Lignite Corporation Ltd AIR [1985] Mad 300 ***(refd)***
Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd [1984] 2 CLJ 56 ***(refd)***
The Motor Emporium v. Arumugam [1933] MLJ 276 ***(refd)***
Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 ***(foll)***
Visia Finance Bhd v. Expert Credit & Leasing Sdn Bhd [1998] 2 CLJ 845 ***(refd)***
YB Patil v. YL Patil AIR [1977] SC 392 ***(refd)***

Legislation referred to:

Civil Procedure Code (Cap 7), s. 151
Rules of the High Court 1980, O. 35 r. 1(2), O. 92 r. 4

Civil Procedure Code [India], s. 151

For the appellant - Zainur Zakaria (Ramid Khan & Goh Peng Hong with him); M/s Bakar & Partners
For the respondents - D Krishna (Peter Yip & Edmund Ponniah with him); M/s Peter Yip & Yong

Reported by Anne Khoo

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JUDGMENT

Gopal Sri Ram JCA:

Preliminary

b This case demonstrates the terrible harm that may be visited upon the litigant's head because of his solicitor's mistake. We hasten to add that the solicitor concerned is no longer on record in the proceedings before us.

Whenever possible; where there is no risk of sacrifice of principle in the c name of justice or at the altar of convenience; we do our best to ensure that a lay client does not suffer because of the mistake of his legal advisers. We do so in the interests of justice. When we act, we always bear in mind what Lord Denning said in *Doyle v. Olby Ltd* [1969] 2 All ER 119, 121:

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> We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far we can. We will correct it whenever we are able to do so without injustice to the other side. Sometimes the error has seriously affected the course of the evidence, in which case we can best order a new trial.

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We have intervened where counsel makes an erroneous admission of law. See, *Lee Hock Ning v. Government of Malaysia* [1972] 2 MLJ 12. But it is not possible where our decision would be in defiance of established principle or where an injustice visited upon the other side. See, *Visia Finance Bhd. v. Expert Credit & Leasing Sdn. Bhd.* [1998] 2 CLJ 845; f [1998] 2 MLJ 705.

Having said that, we must now narrate the facts and background relevant to this appeal.

The Narrative

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The appellant is a public company. It has the monopoly of supplying electricity to consumers throughout Peninsula Malaysia. An action was brought against it by the respondents. It was a claim for damages for the breach of a joint venture agreement. The respondent claimed RM4 million. h The action came to trial before the High Court at Kuala Lumpur. Both sides were represented. At the commencement of the hearing, the pleadings on both sides were amended. Evidence was called. While the respondents' first witness was giving evidence, counsel informed the judge that the trial would be confined solely to the issue of liability. In the event the appellant

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was found liable, quantum would be assessed. The judge agreed to this course. He made an order to that effect. The hearing then proceeded. The trial dates originally fixed proved insufficient. So, on 7 November 1996, (being the last day of the original batch of trial dates), the judge adjourned the trial for continuation to 5 and 6 March, 1997.

When the case was called on for continuation on 5 March 1997, counsel for the respondents was present. So was the respondents' only witness who was then under cross-examination. But he was unwell. There was a difficulty about securing the services of an interpreter. Counsel for the appellant was absent. His excuse was that he was not aware of the hearing date. The court was advised of all these matters by counsel for the respondents. The judge was most accommodating. He vacated the hearing dates. He fixed the suit for continued hearing on 22 and 23 July 1997.

When the cause came on for hearing on 22 July 1997, counsel for the respondents and their witness were present. Counsel for the appellant (not Encik Zainur Zakaria or his learned junior who appeared before us) was absent. So was the appellant's representative. Acting in the best traditions of the Bar, counsel for the respondents requested the hearing to be adjourned to await the attendance of the appellant's counsel. The learned judge quite rightly declined. Counsel for the respondents then asked for judgment to be entered against the appellants for the sum claimed, together with interest and costs. He also moved for a dismissal of the appellant's counterclaim. The judge granted both orders. Later that morning the suit was called on once again. Counsel on both sides were present. Counsel for the appellant apologised to the court for his earlier absence. He made an oral application to set aside the judgment. Respondents' counsel said that his clients would have no objections to such a course. But he said that the court was *functus officio* and that either a formal application or an appeal was necessary. Counsel for the appellant appears to have agreed that this was an accurate statement of the law because he then informed the judge that he would be taking out a formal application on a certificate of urgency. A stay was asked for and not opposed. The judge then directed the application to be filed within seven days.

Was The Judge Functus Officio?

We pause to observe that counsel and the learned judge were quite wrong in assuming that the court was *functus officio* merely because judgment had been entered against the appellant. The default orders made by the learned judge had not been extracted. The court, at the point in time when counsel for the appellant made his oral application, therefore, continued

to have full control over the judgment it had entered. That proposition finds support from the decision of the former Federal Court in *Chee Kuan Cheng v. Chuo Kong Kah* [1967] 2 MLJ 74, where Ong Hock Thye FJ (later CJ (Malaya)) said (at p. 75):

> Until an order is perfected the court's jurisdiction to review the subject matter and to recall an order pronounced is undoubtedly a matter of wide discretion.

There are, of course, cases which demonstrate that the power to recall orders after they are made is not untrammelled. See, eg, *Chua Wah Keow v. Ng Ho Huat & Anor* [1961] MLJ 321. We may add that we have derived much assistance upon this aspect of the case from the admirable judgment of Zulkefli J, in *Chua Weng Meng v. Wong Kok Kong* [1999] 6 CLJ 7; [1999] 2 MLJ 416 where he has collected and carefully analysed all the relevant authorities upon the subject. The governing principle appears to be "that having regard to the extensive rights of appeal now conferred on parties, the power to recall an order which has not been passed and entered is one which should be sparingly exercised". (*Chua Weng Meng v. Wong Kok Kong (ibid)* at p. 422.)

In our judgment the limitations upon the exercise of the power in a court to recall a judgment or order that has not been perfected are of no relevance to the facts that lay before the judge at the relevant point in time. That is because the default judgment entered by the judge was defective and therefore irregular. It was irregular because it had been entered in breach of the express understanding reached between counsel and sanctioned by the court that only the issue of liability was to be tried. The assessment of quantum was postponed. It is plain that this agreement was overlooked all round when the court entered judgment.

In view of that agreement, the learned judge ought to have properly exercised the discretion conferred upon him by RHC O. 35 r. 1(2). That rule of court empowers a judge, in default of appearance of one of the parties at the trial, to proceed with the trial of the action. In the context of the present case, it would have empowered the judge to terminate the cross-examination of the respondents' sole witness and invite re-examination. Such a procedural step would have been unobjectionable. Even if the learned judge was disinclined to adopt such a course, he could at best have entered interlocutory judgment on liability in the respondents' favour and proceeded to either direct an assessment by the Senior Assistant Registrar or have undertaken the assessment himself.

The default judgment being irregular, it was liable to be set aside *ex debito justitae* without reference to merits. We take the principle to be well settled and beyond controversy. But, if authority is required in its support, it may be found in the judgment of Edgar Joseph Jr. FCJ, in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd.* [1996] 1 MLJ 30, at p. 36:

> It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute **or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity.**
>
> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms. Having said that, it should be added that the application to set aside such a judgment should be made: (a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (See O. 2 r. 2(i) of the Rules of the High Court 1980.) (emphasis supplied.)

It may be added, *ex abundanti cautela*, that the disabling elements of reasonable promptitude and the want of a fresh step mentioned by his Lordship are of no significance in the present case. The appellant had, immediately upon learning of the default judgment, moved to have it set aside and took no fresh step to acquiesce in the irregularity.

Further, we are of the view that a written application was, in the particular circumstances, unnecessary. Judgment had been entered because the appellant and its counsel had been absent when the case was called on for continuation. Later the same morning, the suit was called on once again. Counsel for the appellant was present. He apologised for his earlier absence. He proffered an explanation for being late in arriving and asked for the judgment to be set aside with no resistance being offered by his opponent. Accordingly, this was a case where the judge could have acted under RHC O. 92 r. 4 which reads:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

The rule has been held to have jurisdictional effect. See, *Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd.* [1984] 2 CLJ 56; [1984] 2 MLJ 143. Its origin may be traced to s. 151 of the Civil Procedure Code (Cap. 7) of Malaya, which in turn was *ipsissima verba* s. 151 of the Indian Civil Procedure Code. The latter sections provided as follows:

> Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Order 92 r. 4 is declaratory of the inherent jurisdiction of a High Court. The nature and scope of that jurisdiction was explained by Terrell Ag. CJ in *The Motor Emporium v. Arumugam* [1933] MLJ 276, 278. According to the learned Acting Chief Justice, a court:

> [H]as the widest possible jurisdiction in all suits, matters and questions of a civil nature, and although the legislature has given no indication on what principles such jurisdiction should be exercised, every Court must have inherent jurisdiction to do justice between the parties, and apply such principles as are necessary or desirable for attaining such object, and for giving decisions which are in conformity with the requirements of the social conditions of the community where the law is administred.

In our judgment, an order by the learned judge dispensing with a formal written application would have been perfect in keeping with the spirit and intendment of O. 92 r. 4. Equally, he would have been well within his powers to set aside the default judgment he had entered earlier that morning.

As events transpired, the point has turned out to be of pure academic interest only. We have nevertheless dealt with it at some length to give some guidance to trial judges in future cases.

The Narrative Continued

Following the learned judge's direction, the appellant took out a summons to set aside the default judgment. However, when that summons came on for hearing on 13 August 1997, both counsel were absent. The learned judge then quite properly dismissed the summons and vacated the stay he had previously ordered. The appellant then took out another summons to restore the earlier summons for hearing. That application was, of course, hopelessly out of order since there was nothing to reinstate. The summons to set aside the default judgment had not been merely struck out, in which event an application to reinstate it for hearing would be the correct procedural step. It had been dismissed. In other words, it had been finally disposed of and was therefore at an end. If the appellant was unhappy with

the dismissal, it ought to have appealed against that order. It therefore comes as no surprise that the learned judge dismissed the summons to reinstate.

The appellant then appealed to this court. But its appeal was riddled with errors. The respondents therefore took an objection as to the competency of the appeal. A differently constituted bench of this court upheld the respondents' objection and dismissed the appeal.

Following the failure of its appeal, the appellant took out another summons to set aside the same default judgment. Upon this occasion it relied on a completely different ground, namely that the default judgment was a nullity. This summons was dismissed by the learned judge who held that he was *functus officio*. It is against this dismissal that the present appeal has been brought.

Was The Default Judgment A Nullity?

Encik Zainur Zakaria argued that the default judgment was a nullity and could be set aside at any time, even by a subsequent application. We do not agree.

The default judgment was, as we have already observed, irregular. But it was not an order made in defiance of a statutory provision. However, the order of learned judge dismissing the appellant's summons to set aside the default judgment was a final order. So was his order refusing to reinstate the dismissed summons.

The inherent jurisdiction in a court to set aside **final** orders made by it is one that must be exercised with much circumspection. It may be exercised in the case of an order made in contravention of an Act of Parliament. But the jurisdiction does not extend to a **final** order that is procedurally defective and hence merely irregular.

The necessity to carefully maintain the distinction between a **final order** of a court tainted by procedural irregularity and one made in contravention of statute was stressed by the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd.* [1998] 2 CLJ 75; [1998] 1 MLJ 393. It was there recognised that:

> any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. **It should not for instance be applied to a defect in**

> **a final order which has contravened a procedural requirement of any written law.** The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception. (per Mohd. Azmi FCJ, at p. 409.) (emphasis added.)

It is of importance to note that *Badiaddin* was a case in which the plaintiff had brought a fresh action to rid himself of a final order made in contravention of the Malay Reservation Enactment (FMS Cap 142). It was therefore an exceptional case, as the judgments of the Federal Court in that case make plain. We would observe that on its facts, the present appeal has none of the features that were present in *Badiaddin's* case. At the risk of repetition, we say that this is not a case where an order had been made in defiance of a substantive statutory provision.

It is settled law that the expressions "nullity', "void" and "voidable" are wholly inappropriate to describe an order made by a court of unlimited jurisdiction. In *Isaacs v. Robertson* [1985] AC 97 Lord Diplock when delivering the advice of the board said (at pp. 102-103):

> Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are 'voidable' and may be enforced unless and until they are set aside. Dicta that refer to the possibility of there being such a distinction between orders to which the descriptions 'void' and 'voidable' respectively have been applied can be found in the opinions given by the Judicial Committee of the Privy Council in the appeals *Marsh v. Marsh* [1945] AC 271 at p. 284 and *MacFoy v. United Africa Co Ltd* [1962] AC 152 at p. 160; but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall into a category of court orders that can simply be ignored because they are void *ipso facto* without there being any need for proceedings to have them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind; what they do support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two

types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts *ex debito justitiae* the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.

The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular, it can be set aside by the court that made it upon application to that court; if it is regular, it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies.

As we have already said, the default judgment in the present instance was irregular. It was liable to be set aside on application to the court. Such an application was indeed made. But it was dismissed because counsel for the appellant was absent. That order of dismissal was a final order. There then followed the chain of events to which we have adverted. Despite all that occurred, the appellant argues that it is entitled to re-apply to set aside. That is the next issue we must address.

Can A Second Application Be Made?

Encik Zainur Zakaria for the appellant submitted that the appellant's second application to set aside the default judgment was justified because it was based upon a different ground from that relied upon in the first application. Whereas the first application was grounded upon the respondent's consent, the second was made on the basis that the default judgment ought never to have been entered in view of the agreement between the parties to which we have adverted earlier. The default judgment was therefore a nullity and could be set aside at any time.

With respect we are of the view that there is no merit in this argument. In our judgment, the doctrine of *res judicata* in its wider sense provides a complete answer to counsel's submission. It is sometimes referred to as "constructive *res judicata*" "issue estoppel" or "cause of action estoppel", depending upon the particular subject matter to which it is to be applied. It is a doctrine of great antiquity and reflects the role of equity in the field of adjectival law. The most authoritative statement of the doctrine is to be found in the judgment of Wigram V-C, in *Henderson v. Henderson* [1843] 67 ER 313, at p. 319:

> [W]here a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

The point has been considered very recently by the Federal Court in *Kluang Wood Products Sdn. Bhd. & Anor. v. Hong Leong Finance Bhd. & Anor* [1999] 1 CLJ 1; [1999] 1 MLJ 193, where all the relevant authorities upon the subject were considered and discussed in both the majority judgment of Chong Siew Fai CJ (Sabah & Sarawak) and the dissenting judgment of Mohammed Dzaiddin FCJ.

The rule in *Henderson v. Henderson (ibid)* applies not only to separate proceedings but also to subsequent stages of the same proceeding. In *Government of Malaysia v. Dato' Chong Kok Lim* [1973] 2 MLJ 74, the defendant applied to strike out the plaintiff's statement of claim on certain grounds. That application was dismissed by Chang Min Tat J, (as he then was). Later, the defendant took out another application to strike out the action based on grounds different from those relied upon in his earlier summons. It was held that the defendant's second application was barred by the doctrine of *res judicata*. Sharma J, when dismissing the second summons said (at p. 76):

> A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (See *Peareth v. Marriott* [1883] 22 Ch D 182, *Hook v. Administrator-General of Bengal and Others* 48 IA 187 and *In the matter of the Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v. Tan Yew Ghee and Another* [1936] MLJ 141, 147-151). Parties cannot raise a second time in the same suit an issue that has already been determined either espressly or by necessary implication. (See *Louis Dreyfus v. Arunachalaayya* [1931] 58 IA 381).

In a later passage in the same judgment, the learned judge is reported as saying:

> The rule is that a matter which might and ought to have been made a ground of attack or defence becomes a matter which was constructively in issue. A matter which might and ought to have been made a ground of attack or defence in the former application but which was not alleged as such a ground of attack or defence is for the purposes of the plea of *res judicata* deemed to have been a matter directly and substantially in issue in the former application, that is to say, though it may not have been actually directly and substantially in issue it is still regarded as, having been constructively, directly and substantially in issue. There can be no distinction between a claim that was actually made and a claim which might and ought to have been made. The plea of *res judicata* applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and to pronounce its judgment thereupon but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have, brought forward at the time. It is only where the plea which is sought to be raised in the subsequent proceedings was not available to the party at the time of the previous proceedings that the decision cannot be constructively *res judicata*. The rule of constructive *res judicata* is really a rule of estoppel. The question now raised has already been heard and finally decided. It constitutes but a part of the prayer in the former application. It was not collaterally or incidentally but directly and substantially in issue when encl. 9 was heard and decided. The answer to the matter is simple. The defendant's only remedy was by way of an appeal against the decision of Mr Justice Chang Min Tat. The matter was heard on merits and finally decided. It is not capable of re-adjudication by the same court in the same suit. The defendant could certainly re-agitate the matter before the Federal Court if the plaintiff finally succeeds in obtaining judgment and an appeal is filed against that judgment. *The law, as I understand it, is that the defendant is precluded from filing a second application in respect of a matter which, was directly and substantially in issue in the earlier application (encl. 9) in this very court.* If a decision has been given with respect to a matter or part of a matter in controversy between the parties by a court of competent jurisdiction it remains binding in the subsequent stages of the same proceedings in the same court and cannot be re-opened in that court. In my view an erroneous decision irrespective of whether it is on a question of law or fact operates as *res judicata* between the parties to it. The correctness or otherwise of a judicial decision seems to have no bearing upon the question whether it operates as *res judicata* or not. Until that decision is reversed or set aside on appeal its finality and binding force remain operative on the parties. (emphasis added.)

In our view, no criticism may be made of; and we find no reason to disagree with; the statement of principle by so eminent a judge, well known for his mastery of the law governing civil procedure. This court has, in a previous decision, applied the principle enunciated by Sharma J. See, *Hartecon JV Sdn. Bhd. & Anor v. Hartela Contractors Ltd.* [1997] 2 CLJ 104; [1996] 2 MLJ 57.

We pause to note that a strong bench of the Indian Supreme Court (Khanna, Untwalia and Jaswant Singh JJ) in *YB Patil v. YL Patil* AIR [1977] SC 392 reaffirmed the principle. See also *Mitsubishi France v. Neyveli Lignite Corporation Ltd.* AIR [1985] Mad. 300.

No doubt the decision in *Government of Malaysia v. Dato Chong Kok Lim (supra)* concerned an application to strike out a pleading. But we do not apprehend the principle to be any different where there is an application to set aside a default judgment. The point is indeed covered by high authority.

In *Adzmi bin Ali & Anor. v. Mohamed Isa bin Kasad* [1987] 1 CLJ 445; [1987] 2 MLJ 199, the defendant unsuccessfully applied to set aside an interlocutory judgment entered in default of appearance. Later, after damages were assessed, the defendant took out a second application to set aside the interlocutory as well as the final judgments. It was held that the court was *functus officio* and could not entertain the second application. Seah SCJ, when delivering the judgment of the court said (at p. 200):

> In our opinion, when an aggrieved party was dissatisfied with the decision of the learned judge to set aside a default judgment (final judgment under O. 13 r. 1(1) or an interlocutory judgment with damages to be assessed under O. 13 r. 21 the proper procedure to be followed was by way of appeal to the Supreme Court subject to the provisions of s. 68(1)(a) of the Court of Judicature Act 1964. The authority for this view is *Evans v. Bartlam* [1937] AC 473.
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> Now, when the Notice of Motion was set down for hearing the learned judge should have dismissed it on the ground that he was *functus officio*.

We may add that the doctrine of *functus officio* is, upon closer examination, really part and parcel of the wider doctrine of *res judicata*. See, *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd. (supra)*. It is merely another way of saying that it is not open to the court to countenance the particular cause or matter because it has already been finally disposed of.

Applying the foregoing principles to the facts of the present case, it was certainly open to the appellant to ground its first application on the basis that the default judgment was irregular for the reasons we have set out earlier in this judgment. It was therefore an issue which properly belonged to the first application. But it chose not to rely upon that ground. Once the first application was dismissed, it was not open to the appellant to make a second application to set aside the judgment on a different ground. It would, as Haidar JCA, observed during the course of Encik Zainur's argument, amount to presenting one's case in instalments. That is something the law does not permit.

It follows from what we have said thus far that the learned judge was entirely correct in dismissing the appellant's summons.

Conclusion

For the reasons already given, the appeal was dismissed with costs. The orders of the judge were affirmed. The deposit lodged in court was ordered to be paid out to the respondents to account of their taxed costs.